IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.1734 OF 2006

Navin Mohanlal Katarmal
aged about 45 years, an
Indian Inhabitant, residing
at Audawnagar, Chawl No.1,
Room No.6, Khadegovali,
Village - Vithalwadi,
District Thane .. Petitioner.

Vs.

1.The State of Maharashtra
through the Secretary to the
Government of Maharashtra
Home Department (Special)
Mantralaya,
Mumbai 400 032. ..

2. Smt.Neela Satyanarayana
The Principal Secretary
(Appeals & Security)
Government of Maharashtra
Home Department (Special)
Mantralaya, Mumbai 400 032 ..

3. The Superintendent of Prison
The Mumbai Central Prison
Arthur Road, Mumbai ..

4. The Superintendent of Prison
The Nashik Road Central Prison
Nashik Road, Maharashtra .. Respondents.

Mr.Maqsood Khan for the petitioner.
Mr.D.S.Mhaispurkar APP for the respondent-State.

CORAM : SMT.RANJANA DESAI &
D.B.BHOSALE, JJ.
DATED : 17TH JULY, 2007.

JUDGMENT: (PER D.B.BHOSALE, J.)

. This writ petition under Article 226 of the

Constitution of India is filed by the brother of detenue, one Jitendra Mohanlal Katarmal, challenges an order of detention dated 26th August, 2005 issued by the Principal Secretary (Appeals and Security), Government of Maharashtra, Home Department (for short "detaining authority") in exercise of his power under section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (52 of 1974) (for short "COFEPOSA Act") with a view to preventing the detenue from smuggling goods in the future.

2. The order of detention dated 26.8.2005 was served upon the detenue on 24.6.2006 alongwith the grounds of detention and material in support thereof. The grounds of detention indicate the nature of prejudicial activities of the detenue. It appears that on the basis of the intelligence received by officers of the Directorate of Revenue Intelligence (for short "the DRI"), they detained three containers of Red Sanders which were illegally exported on three different occasions by misdeclaring them as "Poha" and "Coriander Products" respectively. The consignors and consignees on all the three occasions were different. The containers on all the three occasions were examined by the officers of DRI in the presence of panchas. The enquiry conducted at Delhi

reflected that the consignors were non-existent firms. During enquiry in order to ascertain true facts of the case, summons were issued to several persons whose statements were recorded under section 108 of the Customs Act including the statement of the petitioner. The record reveals that a gang was apprehended by the Thane police who were indulging in the export of Red Sanders by using fake stamps and seals. The Thane police were contacted to get the details and it was found that the same gang had operated in sending Red Sanders also. We do not deem it necessary to give further details for deciding the instant writ petition. Suffice it to say that the grounds of detention do indicate that the detenue was, indeed, involved in smuggling of goods on a large scale. It appears that after perusing the material in support of the grounds of detention, the detaining authority has observed that the extent and gravity of the offence, the well planned manner in which the detenue had been indulging in smuggling activities and his connection with international smuggling syndicate outside the country coupled with his indepth knowledge of clearance of cargo through docks and customs procedures which he can misuse, clearly reflect his high propensity and potentiality to indulge in prejudicial activities in the future.

3. We have heard the learned counsel for the parties at length. With their assistance we have perused the entire material placed on record so also the judgments relied upon by them. Mr.Khan, learned counsel for the petitioner challenges the order of detention only on a singular ground. He submitted that there is a delay of ten months in executing the order of detention, which delay has rendered subjective satisfaction of the detaining authority not genuine. He submitted that the order of detention dated 26.8.2005 was served on the detenue on 24.6.2006 and this delay has not been appreciated by the detaining authority in proper perspective. The detenue was involved in another offence bearing C.R.No.281/2004 registered by Mumbra police station and in that case he was enlarged on bail. This fact, according to Mr.Khan, was known to the detaining authority as reflected in the grounds of detention. He then submitted, the DRI had summoned the detenue for recording his statement under section 108 of the Customs Act after his release on bail in the aforesaid crime. He was not even arrested under section 104 of the Customs Act. Mr.Khan submitted that no application for cancellation of bail of the detenue in C.R.No.281/2004 was made either by the sponsoring authority or the police authority. Except seeking an information as to on how many dates the

detenue appeared before the Magistrate in C.R.No.281/2004, no efforts were made either by the sponsoring authority or police authority seeking cancellation of the bail. He further submitted that no action under section 7(1)(a) or 7(1)(b) of the COFEPOSA Act was taken, which was incumbent on the part of the authorities. No proclamation was made under section 7(1)(b) of the COFEPOSA Act. He then submitted that attempts to serve a copy of the detention order on the detenue was made only at his residence and the surrounding area and at no other place. In support of his contentions he placed heavy reliance upon the following judgments: **(i) P.M.Harikumar Vs. Union of India and Others AIR 1996 Supreme Court 70; (ii) S.M.F.Sultan Abdul Kader Vs. Jt.Secretary to the Government of India and Others 1998 SCC (Cri.) 1534; (iii) T.A.Abdul Rehman Vs. State of Kerala and Others AIR 1990 Supreme Court 225; (iv) Rameshkumar Balkisan Cibal Vs. The State of Maharashtra & Ors. 1997 ALL Mah. (Cri.) 1810; and (v) Ismail Shaikh Ali Vs. State of Maharashtra & Ors. 1998(2) Crimes 35 (Bom.)**. Mr.Khan did not urge any other contention.

4. Mr.Mhaispurkar, learned A.P.P., on the other hand submitted that lot of efforts were put in by the executing authority to execute the detention order,

but in vain since the detenue was absconding during the said period. He invited our attention to the affidavit of the executing authority dated 16.12.2006 and submitted that it is clearly reflected in the affidavit as to what efforts were made by the executing authority. He took us through paragraph 3 of the affidavit in particular to contend that the right from the date, that is, 29.8.2005, they received the order of detention alongwith the grounds of detention and compilation of the documents, they made several attempts by visiting the residence of the detenue as also to his relatives and other persons in the locality where the detenue was residing. The detenue was, however, not found in his house. Mr.Mhaispurkar submitted that they did not file application for cancellation of bail since they did not find it necessary and they were hopeful of the execution of the order since they were making all sincere efforts to arrest him. Having failed in their efforts, on 23.5.2006 they issued a letter to the Police Inspector, Crime Branch, Thane (E.O.W.) requesting him to take action for cancellation of bail in Crime registered at Mumbra police station. The investigating officer, in turn, made an application on 19.6.2006 to the learned Magistrate seeking information as to whether the detenue attended all the dates of hearing before him.

However, before further steps were taken, on 26.6.2006, the detenue came to be arrested and the order of detention was served upon him and hence it cannot be said that no efforts were made by the detaining authority to execute the order of detention. He submitted that the detenue cannot take advantage of his own wrong and the due and diligent efforts made by the executing authorities to execute the order of detention on the detenue cannot be disregarded. He then submitted that the action under section 7(1)(b) of the COFEPOSA was also initiated against the detenue on 6.3.2006. In the circumstances Mr.Mhaispurkar submitted that the order of detention cannot be faulted. In support of this submission Mr.Mhaispurkar placed reliance upon the judgments of this Court in **(i) Bapu Shantaram Satam Vs. Union of India and Ors. in Writ Petition No.1909 of 2003 decided on 29.6.2004; (ii) Smt.Poonam Rajeev Pathak Vs. The Union of India & Ors. 2002 ALL Maharashtra Reporter (Cri.) 2182; and (iii) Bhawarlal Ganeshmalji Jain Vs. State of Tamil Nadu & Ors. AIR 1979 SC 54.**

5. It is true, as observed by the Supreme Court in **P.M.Harikumar's** case (supra), that the sponsoring as well as the executing authorities are expected to be really sincere and anxious to serve the order of

detention and it should be reflected in every action of theirs. The Supreme Court has further observed that the order of detention should be served without any delay and it is expected of the authorities, in the fitness of things to approach the court which initially granted bail for its cancellation particularly when the detenue had violated the conditions imposed. The concerned authorities are also expected to place on record the material to show that they made serious attempts during the whole period of delay to find out if the detention order was executed or not. It is also settled by the Supreme Court in **T.A.Abdul Rehman's** case (supra) that when there is unsatisfactory and unexplained delay between the date of order of detention and the date of securing the arrest of the detenue, such a delay would throw considerable doubt on the genuineness of the subjective satisfaction of the detaining authority leading to a legitimate inference that the detaining authority was not really and genuinely satisfied as regards the necessity for detaining the detenue with a view to preventing him from acting in prejudicial manner. The detaining authority is expected to take recourse to the effective methods enjoined by law to have detention order served on the detenue. If no such steps are taken and if there is considerable delay in execution of the detention

order such order cannot be sustained in law. It is true that the law does not prescribe time limit for commencing action under section 7. However, it is implicit that action under the said provision must be taken without much loss of time. If the action under section 7 is taken belatedly it may result in the detention order being belatedly executed on the detenue and it may vitiate the genuineness of the subjective satisfaction of the detaining authority to preventively detain the detenue but also severes the live link between the prejudicial activities of the detenue and the rationale behind clamping a detention order on him. In **Ismail Shaikh Ali's** case (supra) this court has observed that the detention order is vitiated in law on the ground of delay if there is no plausible explanation and the most effective methods stipulated by the law to have it executed are not taken recourse too. In that case action under section 7(1)(a) and 7(1)(b) were held to be effective methods to serve the order of detention upon the detenue. It is also observed in the said case that it is implicit that action under section 7 must be taken without much loss of time. In **Rameshkumar Balkisan Cibal's** case (supra) this court after taking note of the efforts made to serve the order of detention on the detenue has observed that in the facts of that case the correct course for the

respondents was to apply for cancellation of bail or to take action under section 7(1) of the COFEPOSA Act. The cumulative effect of all these acts and omissions on the part of the respondents vitiates the order of detention. It is against this settled position of the law we would now like to examine the present case.

6. In the present case the order of detention was issued on 26.8.2005. The order of detention alongwith the grounds of detention and the documents relied upon in support thereof were received by the executing authority of the State Government late in the evening on 29th August 2005, the 28th August, 2005 being a holiday. The executing authority in their affidavit dated 16th December, 2006 in paragraph 5 have given an account of efforts made by them to execute the order of detention against the detenue. It would be advantageous to reproduce relevant averments in the said paragraphs to appreciate the submissions of learned counsel for the parties better.

> . It is stated that on 1.9.2005, 3.9.2005, 5.9.2005 and 7.9.2005 PSI Shingade of Crime Branch, Thane, Ulhasnagar Unit alongwith the staff had visited the residence of the detenu in order to execute the Order of Detention against the detenu. However, the detenu was not found. It is stated that on 8.9.2005 PSI Shingade of Crime Branch, Thane, Ulhasnagar Unit alongwith DRI officers

had visited the residence of the detenu, however, he was not found. It is further stated taht on 12.9.2005 PSI Shingade of Crime Branch, Thane, Ulhasnagar Unit and his staff had visited the residence of the detenu. However, he was not found. It is stated that the staff of the Crime Branch of Ulhasnagar Unit and Kalyan Unit, consistently visited the residence and the surrounding vicinity of the detenu on the following dates, however, the detenu was not found. Enquiries were also made with the family members of the detenu and with the neighbours residing in the said area. However, the detenu was not found. The dates are as under:

. 18.9.2005, 25.9.2005, 30.9.2005, 3.10.2005, 9.10.2005, 14.10.2005, 18.10.2005, 28.10.2005, 30.10.2005, 4.11.2005, 20.11.2005, 5.12.2005, 20.12.2005, 23.1.2005, 23.1.2006, 30.1.2006, 4.2.2006, 1.3.2006, 11.3.2006, 22.3.2006, 1.4.2006, 8.4.2006, 2.5.2006, 13.5.2006 and 15.5.2006.

. It is stated that the photograph of the detenu was also obtained from MOB Branch by PSI Badgujar of Crime Branch, Thane, Kalyan Unit to establish the identity of the said person if found. However, the detenu was not found. It is statd that on 23.5.2006 a letter was given to PI Crime Branch, Thane (EOW) to take action for cancellation of bail in Mumbra police station CR No.I-281 of 2004 in which the detenu was the accused. It is stated that the detenu constantly remained absent on the dates before the Learned J.M.F.C. Court. On 12.12.2005 the Police Official who was present on the said date before the Learned J.M.F.C. Court in Case No.963 of 2004 registered by Mumbra Police Station was not aware that an Order of Detention being issued against the detenu, hence the fact that the detenu was present before the Court on 12.12.2005 was inadvertently not brought to the notice of the Executing Authority. Hence, the Order of Detention could not be executed on the detenu on the said date. It is stated that on 5 occasions the detenu continuously remained absent before the J.M.F.C., 1st Court, Thane, hence the delay in executing the Order of Detention against the detenu, the detenu

cannot take advantage of his own wrong.

. On 16.5.2006 PSI Badgujar of Crime Branch, Kalyan Unit alongwith the other staff made enquiries about the detenu in Khadegolavali, Vithalwadi, Kalyan and Dombivali. However, the detenu was not traceable. On 28.5.2006 and 31.5.2006 efforts were made to trace out the whereabouts of the detenu at various places in Kalyan and also watch was kept in J.M.F.C., 1st Court, Thane, where the detenu was an accused in Mumbra Police Station case i.e. CR No.I-281 of 2004. It was informed that the detenu was not attending the dates in the Court in the given case. On 4.6.2006, 9.6.2006 and 11.6.2006 consistent efforts were made to trace out the detenu, however, the detenu was not traceable. On 24.6.2006 information was received that the detenu would be visiting at Shilphafata Chowk, Mumbra, accordingly the trap was laid and the detenu was arrested and on the same day the Order of Detention was executed on the detenu and the detenu was also furnished with all the documents and the acknowledgement of the detenu was duly obtained.

7. The explanation offerred by the executing authority in the aforesaid paragraph of the affidavit shows that PSI of Crime Branch had visited the residence of the detenue on several occasions in order to execute the order of detention, however, the later was not found. They also visited the surrounding vicinity of the detenue's residence and also made enquiries with his family members and the neighbours. All these efforts were made between 1.9.2005 and 15.5.2006. During this period of eight and a half month all the aforesaid steps were taken. It further appears that a photograph of the detenue

was also obtained to establish his identity, if found. After having failed in their aforesaid efforts, namely, keeping vigilance on the house of the detenue and making enquiries with his family members and the neighbours and obtaining a photograph, it is stated in the affidavit of the executing authority, that they took action for cancellation of bail in the crime registered at Mumbra police station. Our attention was invited to the letter dated 19.6.2006 send by the Senior PI to the concerned Magistrate before whom the aforesaid case was pending. This application was made by the Senior PI in response to the letter dated 23.5.2006 of the executing authority requesting action to be taken for cancellation of the bail. A bare perusal of the letter dated 19.6.2006 brings forth that only the information as to whether the detenue/accused remained present in the court on the dates so fixed in the aforesaid case was sought and further stating that since the accused did not appear on all dates fixed for hearing, an appropriate action be taken against him. On that application the only endorsement made by the Magistrate was "seen" on 21.6.2007. A bare perusal of this application shows that there was no prayer or request for cancellation of the bail. It only makes a reference to the dates on which the detenue did not remain present before

the court. We fail to understand as to why the detaining authority has not placed on record the roznama of the case pending before the Magistrate so as to ascertain the dates fixed by the court and the dates the detenue actually remained present before the court. However, no such efforts were made by the detaining authority. The dates mentioned in the aforesaid paragraphs in the affidavit of the executing authority would show that from 29.8.2005 till 23.5.2006 no efforts were made to execute the detention order, except visiting the residence of the detenue on several occasions and obtaining a photograph to establish the identity of the detenue, if found. If they were really sincere and anxious to serve the order of detention, it was possible for them to remain present on the date/s before the concerned Magistrate to find out whether the detenue was appearing in the case without wasting 8-9 months. They ought to have moved the investigating officer which they did by issuing letter dated 23.5.2006 not only for seeking information but requesting them to apply for cancellation of the bail. As a matter of fact they could have approached the court themselves for seeking information and for cancellation of the bail. It appears from the application dated 19.6.2006 that the detenue did appear before the concerned Magistrate on 12.12.2005. Had they been

sincere and anxious they could have arrested him on the very same day. The only explanation offerred in the affidavit is that through inadvertence it was not brought to their notice and hence they could not execute the detention order on 12.12.2005. The explanation offerred by the sponsoring authority explaining the delay is unsatisfactory. Such a delay in our opinion would throw considerable doubt on the genuineness of the subjective satisfaction of the detaining authority, leading to legitimate inference that the detaining authority was not really and genuinely satisfied as regards detaining the detenue with a view to preventing him from acting in a prejudicial manner.

8. The detaining authority in the present case even did not take recourse to most effective measure enjoined to have detention order served on the detenue, namely, action under section 7(1)(a) and/or prompt action under section 7(1)(b) of the COFEPOSA Act. There was no reason why they waited for about 9 months requesting the police authorities to apply for cancellation of bail. We also do not find any plausible ground as to why they waited till 3.6.2006 to take action under section 7(1)(b) of the COFEPOSA Act. There are laches on the part of the detaining authority. It is true that no time limit is

prescribed for commencing action under section 7 of the COFEPOSA Act, however, the action under the said provision must be taken without much loss of time as held by this Court in **Ismail Shaikh Ali's** case. The explanation given by the executing authority is far from satisfactory. In view of the peculiar facts and circumstances of this case merely because the detenue was not found at his residence the detaining authority cannot try to explain the lethargy and callous approach of the authorities responsible for speedy execution of detention order by saying that the detenue cannot take advantage of his own wrong. In the facts of the present case we are satisfied that no sincere efforts were made by the executing authority to execute the order of detention upon the detenue. In our opinion, the cumulative effect of all these steps, acts and omissions on the part of the respondents vitiates the order of detention which is liable to be set aside.

9. In **Bapu Shantaram Satam's** case (supra) the Division Bench of this Court to which one of us (Smt.Ranjana Desai, J.) was the presiding party is of no avail to the respondents. We perused the said judgment and more particularly paragraph nos.9, 11, 12 and 13, which show that the executing authority did not keep a single stone unturned for executing

the order of detention upon the detenue in that case. No such efforts are found to have been made in the present case. That judgment in our opinion would not help the prosecution at all. Even the judgment in **Poonam Pathak's** case relied upon by Mr.Mhaispurkar, learned A.P.P. is of no avail. The proclamation under section 7(1)(b) of COFEPOSA in that case was issued. The question of shifting burden on the detenue as provided for under section 7(1)(b) of the COFEPOSA Act does not arise in the present case since immediately after issuance of the proclamation the detenue was arrested and the order of detention was executed apart from the fact that it was issued at belated stage. In our case it is also not clear whether the proclamation was published in the official gazette. For the self same reason even the judgment in **Bhawarlal Ganeshmalji Jain's** case is also of no avail to the respondents.

10. In the circumstances the order of detention deserves to be quashed and set aside. Order accordingly. Rule is made absolute. Since the detenue has undergone detention period we refrain from passing further orders. The petition is disposed of. No costs.

(SMT.RANJANA DESAI, J.)

(D.B.BHOSALE, J.)